IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 27TH MARCH 2007 / 6TH CHAITHRA 1929

C.M.A.No.204 of 1996

A.S.NO.94/1993 OF THE COURT OF THE ADDITIONAL DISTRICT JUDGE-I, MAVELIKKARA.

E.A.NO.253/1990 IN E.P.NO.199/1990 IN O.S.NO.185/1976 OF MUNSIFF'S COURT,HARIPAD.

.....

APPELLANT/RESPONDENT/COUNTER PETITIONER/PLAINTIFF:-

KOCHAN KRISHNANKUTTY, AKKARAKKARAN PARAMBIL,
KOTTE MURI, THRIKKUNNAPPUZHA VILLAGE.

BY ADV. SRI.M.P.KRISHNAN NAIR

RESPONDENTS/APPELLANTS/PETITIONERS/DEFENDANTS 3 & 4:-

***** 1. VASUDEVAN DEVADAS, PUTHEN VEETTIL, KOTTEMURI, THRIKKUNNAPUZHA VILLAGE **(DIED).**

****** 2. VELAYUDHAN DAMODARAN, PUTHEN VEETTIL, KOTTEMURI, THRIKKUNNAPUZHA VILLAGE **(DIED)**.

***** ADDITIONAL RESPONDENTS 3 TO 5 IMPLEADED:

ADDL.3. GEETHA, W/O.VASUDEVAN DEVADAS,
AGED 40 YEARS, PUTHEN VEETTIL HOUSE, KOTTE MURI,
THRIKKUNNAPUZHA VILLAGE.

ADDL.4. DILEESH DEVADAS, S/O.VASU, AGED 21 YEARS,
PUTHEN VEETTIL, KOTTE MURI, THRIKKUNNAPUZHA VILLAGE.

ADDL.5. DEEPTHY DEVADAS, D/O.VASUDEVAN DEVADAS,
AGED 19 YEARS, PUTHEN VEETTIL, KOTTEMURI,
THRIKKUNNAPUZHA VILLAGE.

(ADDITIONAL RESPONDENTS 3 TO 5 ARE IMPLEADED AS THE LEGAL REPRESENTATIVES OF DECEASED 1ST RESPONDENT AS PER ORDER ON C.M.P.NO.4372 OF 2002 DATED 24.7.2002)

** ADDITIONAL RESPONDENT NO.6 IMPLEADED:

ADDL.6. GOPI, S/O.VELAYUDHAN DAMODARAN,
GAURI BHAVAN, BEACH WARD, ALLEPPEY.

(ADDITIONAL 6TH RESPONDENT IS IMPLEADED AS THE LEGAL HEIR OF DECEASED 2ND RESPONDENT AS PER ORDER DATED 27.06.2006 ON C.M.P.NO.5987 OF 2002).

R1 BY ADV. SRI.SRI.G.S.REGHUNATH
SRI.M.RAMASWAMY

THIS CIVIL MISCELLANEOUS APPEAL HAVING BEEN FINALLY HEARD ON 27/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

K.Padmanabhan Nair,J.

C.M.A.No.204 of 1996

Dated, this the 27th day of March, 2007

JUDGMENT

The plaintiff-decree holder in E.P.No.199 of 1990 in O.S.No.185 of 1976 on the file of Munsiff's Court, Haripad is the appellant in this Civil Miscellaneous Appeal. The appeal is filed challenging an order of remand passed by the lower appellate Court.

2. The short facts necessary for the disposal of this appeal are as follows: The appellant filed a suit for partition against deceased respondents 1 and 2 and others. The suit was decreed. The final decree was passed. In the decree, a plan was appended, in which a plot having an extent of 15.130 cents was allotted to the share of the appellant. Subsequently, he filed E.P.No.199 of 1990 for delivery of the property allotted. The executing Court deputed an Amin, who was assisted by the Village Officer. The property was located and delivered. Subsequently, deceased respondents 1 and 2 filed E.A.No.253 of 1990 for redelivery of a portion of property delivered over to the appellant alleging that there was excessive execution. It was contended that the plot allotted to the appellant was inclusive of a small canal, which lies on the eastern side of the property and while executing the decree, the Amin and Village Officer

excluded the area covered by the canal and then delivered over 15.130 cents of property and that is against the final decree passed. The executing Court dismissed that application. Challenging that order, the deceased respondents 1 and 2 filed A.S.No.94 of 1993 before the Additional District Judge-I, Mavelikkara. The learned District Judge allowed the appeal, set aside the orders passed by the executing Court and remanded the matter, but virtually holding that there was excessive execution. In fact, the lower appellate Court held that instead of ordering redelivery, he is remanding the case for fresh disposal. Challenging that order, this appeal is filed.

3. The matter arises in execution. The dispute is between decree holder and judgment debtors. The suit was one for partition and a final decree was passed. A plan prepared by the Commissioner and marked as Exhibit C1(b) is appended as part of the decree. Execution Petition was filed for delivery of the property. Property was delivered. Thereafter the judgment debtors filed E.A.No.253 of 1990 complaining excessive execution alleging that in the property delivered over to the decree holder something more than what he was actually entitled to was delivered. How an appeal is maintainable against such an order is not considered by the learned District Judge. If it was a petition filed under Section 47 of the Code of Civil Procedure, whether the aggrieved party is

entitled to file an appeal was not considered. It is submitted by the counsel for the appellant that remedy available to the aggrieved party is to file a revision and not an appeal. The lower appellate Court has not considered the maintainability of the appeal. So, I have no other option but to set aside the judgment of the lower appellate Court and remand the matter to that Court for reconsideration. The learned District Judge made certain observations which are likely to affect the merits of the case. Since the lower appellate Court decided to remand the case, he should not have made such observations.

In the result, this Civil Miscellaneous Appeal is allowed. The judgment in A.S.No.94 of 1993 dated 04.01.1996 passed by the Additional District Judge-I, Mavelikkara is hereby set aside and the matter is remanded to that Court for fresh disposal in accordance with law. The parties shall appear before the lower appellate Court on 29.05.2007. C.M.P.Nos.2820 of 1996 and 5945 of 1997 shall stand dismissed.

K.Padmanabhan Nair
Judge

vku/-